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Nos. 71-1016 and 71-1040

In the Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION, PETITIONER

v.

LOUISIANA POWER & LIGHT COMPANY, ET AL.

UNITED GAS PIPE LINE COMPANY AND PENNZOIL UNITED, INC., PETITIONERS

v.

LOUISIANA POWER & LIGHT COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

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I

THE GAS SUPPLY SITUATION

The fact that this nation is presently in a natural gas supply crisis has been judicially recognized by

several courts,[1] including both the district court (Pet. App. 35a)[2] and the court of appeals (Pet. App. 1a) in this case. Nevertheless, LP&L asserts that gas is available and that the shortage is "contrived" (LP&L Br. 14, 36–38). While our main brief refers to the acuteness of the current shortage, some additional facts should be noted in view of LP&L's challenge.

Not only are there twenty-six curtailment proceedings currently pending before the Federal Power Commission, but, as of February 1972, twenty-two state regulatory agencies have taken action to limit retail sales of natural gas, and eight additional state agencies were conducting proceedings relative to the gas shortage.[3]

As evidence of a contrived gas shortage, LP&L cites notices in the Federal Register of applications to make emergency purchases of gas by United and the Transcontinental Gas Pipe Line Corporation ("Transco")

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[1] *Southern Louisiana Area Rate Cases (Austral Oil Co. v. Federal Power Commission et al.)*, 428 F.2d 407, 443 (C.A. 5), certiorari denied *sub nom. Municipal Distributors Group v. Federal Power Commission*, 400 U.S. 950; *City of Chicago, Illinois, et al. v. Federal Power Commission*, No. 23,749, decided December 2, 1971, Slip op. pp. 28–29, 32, certiorari denied, April 17, 1972 (No. 71-979).

[2] "Pet. App." references are to the appendices to the petitions in No. 71-1016. "United . . . App." references are to the appendices to the petitions in No. 71-1040.

[3] National Association of Regulatory Utility Commissioners Subcommittee of Staff Experts to Gas Committee, "Survey of Action by State and Federal Regulatory Agencies and Intrastate Natural Gas Distributors to Meet Natural Gas Shortages", February 29, 1972, Attachment 1.

(LP&L Br. 26). Actually, fourteen pipelines have made emergency purchases of gas to mitigate the shortage, but, even so, seven interstate pipeline companies were unable to meet contract requirements and were compelled to curtail, including Transco and United.

LP&L has also cited the annual reports of three distribution companies to support its assertion that no shortage exists (LP&L Br. 36–37). Adequate service to two of the three companies,* which serve human needs customers, is being maintained as a result of curtailment programs presently in effect pursuant to Commission order and other Commission action, such as allowing emergency purchases by interstate pipelines. See Commission Orders Nos. 402, 402-A and 431, 36 Fed. Reg. 7511, 8027; 36 Fed. Reg. 7705; see also 18 C.F.R. 157.22.

II

THE LEGISLATIVE HISTORY

LP&L argues (LP&L Br. 30–33) that Congress did not intend in Section 1(b) of the Natural Gas Act, 15 U.S.C. 717(b), to give the Commission authority over curtailments of deliveries of natural gas to the

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*One distribution company cited by LP&L, Public Service Company of Colorado, purchases its gas from Colorado Interstate Gas Company, and is not dependent either directly or indirectly upon United.

On April 7, 1971, after LP&L's complaint in this case was filed, LP&L filed a registration statement with the Securities and Exchange Commission, stating that after June 1971, LP&L expects to be able to offset any foreseeable gas curtailment by burning oil. (App. 193).

direct industrial customers of an interstate pipeline. Great emphasis is placed on the portion of Section 1(b) that provides that, while the Act applies to the transportation of natural gas in interstate commerce, to sales of interstate gas for resale and to natural gas companies, it does not apply to "any other transportation or sale of natural gas." Reference to the legislative history of Section 1(b) shows that, with respect to direct industrial sales, the quoted provision was intended solely to exclude Commission jurisdiction over rates.

As originally introduced in the House of Representatives, Section 1(b) contained a proviso expressly excluding Commission jurisdiction over the "rates * * * for * * * the sale of natural gas for industrial use only." H.R. 4008, 75th Cong., 1st Sess. This original bill was amended and renumbered in committee to contain the language ultimately adopted excluding application of the Act to "any other * * * sale." See

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* LP&L asserts (LP&L Br. 35) that the Louisiana regulatory commission "* * * will have a better knowledge of the 'public interest' in Louisiana in terms of gas usage" than the Federal Power Commission, arguing that "[t]here can be no doubt that the Louisiana Commission, made up of elected officials, will be more responsive to the needs of Louisiana citizens in allocating the use of gas." But the citizens of the numerous other States throughout the country who are dependent for their gas on the access of United and other interstate pipelines to natural gas produced from Louisiana gas fields, are entitled to equal consideration. Clearly, these citizens would be adversely affected by rulings of the Louisiana commission (rulings which may be beyond that agency's constitutional authority; see pp. 25-26 of our main brief) allocating gas produced in Louisiana but committed to interstate commerce.

H.R. 6586, 75th Cong., 1st Sess., pp. 3–4. The committee report which accompanied the revised bill reveals that the new language was intended merely to restate the proviso in H.R. 4008 concerning the fixing of rates.[6] Commenting on Section 1(b), the report stated (H. Rep. No. 709, 75th Cong., 1st Sess., p. 3):

> * * * It will be noted that this subsection of the bill, after affirmatively stating the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows:
>
> "but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the production or gathering of natural gas."
>
> The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill.

[6] The revision to Section 1(b) made by the committee was proposed by the General Solicitor of the National Association of Railroad and Utilities Commissioners who supported the bill. He testified that direct industrial sales should be exempt from Commission jurisdiction to permit State commissions, which set rates for distribution company customers, to set the rates for direct industrial customers as well, to prevent unjustifiable discrimination at the retail level. Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 4008, 75th Cong., 1st Sess., p. 148. There thus can be little doubt that the purpose of the limiting language in Section 1(b) was to deprive the Commission of jurisdiction over the rates at which direct industrial sales are made.

The Senate committee report on this point was identical. See S. Rep. No. 1162, 75th Cong., 1st Sess., p. 3.

Thus, the exclusion of retail sales—whether by pipelines to direct industrial consumers or by distribution companies—from Commission jurisdiction does not negate with respect to non-rate matters the Commission's independent jurisdiction over the transportation of natural gas in interstate commerce. And, as we pointed out in our main brief, pp. 24–25, this court has squarely recognized that "the matter of interrupting service is one largely related * * * to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states." *Panhandle Eastern Pipe Line* v. *Public Service Commission of Indiana*, 332 U.S. 507, 523; see also *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 27–28.[2]

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[2] LP&L's claim (LP&L Br. 33–34) that former Commission Chairman Swidler's testimony in connection with proposed legislation contradicts this construction of the Natural Gas Act is not accurate. Reference to the proposed legislation reveals that the Commission sought rate jurisdiction over direct industrial sales. And the reference to the Commission's 1970 Annual Report is also misread. The report refers to legislation to require emergency interconnections and curtailments and allocations by any gas company whether or not subject to the Commission's jurisdiction, a provision which would reach distribution companies and intrastate pipeline companies, if adopted by Congress. In any event, proposals of an administrative agency to clarify or confirm its jurisdiction over a particular subject matter should not be construed as evidence that such jurisdiction does not already exist. *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 169–171; *Helvering* v. *Clifford*, 309 U.S. 331.

III

JURISDICTION OVER DIRECT SALES IS NOT LIMITED TO SECTION 7 OF THE NATURAL GAS ACT

a. The court of appeals (Pet. App. 16a) acknowledged that the Commission has some jurisdiction over direct sales pursuant to the transportation authority, but sought to limit the Commission's power to exercise such jurisdiction to Section 7 of the Natural Gas Act, 15 U.S.C. 717f (see p. 18 of our main brief). The effect of this position, if upheld, would be to sustain LP&L's claim (if supportable as a matter of contract law) that it has a preferential contract right, superior to the rights of domestic and other consumers, to the delivery of gas (LP&L Br. 4, 9, n. 6)—a right which the Commission would be powerless to affect under Sections 4, 5 and 16 of the Natural Gas Act, 15 U.S.C. 717c, d and o.[8]

As we have noted (main brief, pp. 33–34), Sections 7(c), 4(b) and 5(a) are similarly worded, and there is no basis for finding that the Commission's transportation authority applicable under Section 7 to direct sales is not similarly applicable under Sections 4 and 5 to direct sales. Moreover, Section 4(b) by its own terms applies to service and prevents a natural gas company from discriminating in service to "any

[8] LP&L appears to concede that Sections 4, 5 and 16 would be applicable to curtailments of gas deliveries to direct industrial customers, if such curtailments are in fact covered by Section 1(b) of the Act (LP&L Br. 23, n. 10). The briefs of some of the *amici* dispute this proposition.

person".[7] With respect to Section 5(a), this Court has expressly held in a pipeline rate case that, while the Commission lacks authority to fix rates for direct industrial sales, it may take direct sales rates into consideration in fixing rates for interstate wholesale sales. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635. The Court found it clear that contracts covering direct industrial sales come within the portion of Section 5(a) which reads "or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential." 324 U.S. at 647.

If Sections 4, 5 and 16 do not apply to curtailments of deliveries of natural gas to direct industrial customers, interstate pipelines would be free to grant preferences to or discriminate in favor of direct industrial customers with respect to natural gas service. And, as LP&L correctly puts it, all direct customers would be immune from Commission curtailment proceedings (LP&L Br. 14–15). Our views of the Commission's broad powers under Sections 4, 5 and 16 over curtailments of deliveries of interstate natural gas to *all* customers of a pipeline, whether direct or wholesale, are set forth at pages 26–34 of our main brief.

b. In support of its claim that direct industrial cus-

[7] The Third Circuit has held that the Commission is empowered under Section 4(b) to allocate natural gas among a pipeline's direct industrial and distribution company customers. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 232 F. 2d 467, 472–473 (C.A. 3), certiorari denied, 352 U.S. 891.

tomers are immune from federal curtailment jurisdiction, LP&L relys upon *Federal Power Commission* v. *Transcontinental Gas Pipe Line Corp., supra,* wherein this Court upheld the Commission's authority to consider end use, as well as price factors, in determining whether initially to certificate a sale under Section 7(c) of the Natural Gas Act (see pp. 24–25 of our main brief). LP&L argues (LP&L Br. 29–31) that in holding that the Commission has a "veto power" over direct sales in initial certification proceedings under Section 7(c) (365 U.S. at 17) and in recognizing that the Commission does not have "complete allocation" power (365 U.S. at 19), the Court impliedly ruled that the Commission has no curtailment jurisdiction over direct sales other than under Section 7.

In our view, there is no basis for LP&L's argument. First, the reference to the Commission's "veto power" reflected the fact that in proceedings under Section 7(c), the Commission may veto proposed direct sales, but may not set the rates. This case, however, involves neither initial certification proceedings under Section 7(c) nor the setting of rates for direct sales.[10] Instead, it concerns proceedings invoking the Commission's authority under Sections 1, 4, 5 and 16

[10] In Opinion No. 696, the Commission rejected a proposal by United that would have given lowest curtailment priority to power plant and industrial customers that pay noncompensatory rates. In doing so, the Commission noted that "there is little correlation between the need to curtail deliveries because of inadequate gas reserves and the degree of compensation received for the sale of the limited gas supplies which are available" (Pet. App. 68a).

of the Act to allocate *service* in order to protect the consuming public during a gas shortage. In short, the Court did not state, as LP&L asserts, that the Commission had only "veto power" jurisdiction over direct transactions; it held that, *in a Section 7(c) proceeding for initial certification*, the Commission's authority was limited to a "veto power."

Finally, this Court's statement in *Transcontinental Gas* that the Commission lacks "complete allocation power", when placed in proper context, does not cast doubt on the Commission's jurisdiction over curtailments. In making the statement, the Court was referring to the Commission's admission that it did not have complete power over conservation of total gas reserves because many reserves were committed to purely *intrastate* gas companies. We are not concerned here, however, with an intrastate supply of gas; we are concerned with an interstate supply.

IV

THE GREEN SYSTEM

With respect to the certificate proceeding, we adhere to our view (main brief, pp. 35–38) that the only issue before this Court is whether the Commission should have been given the opportunity to determine its jurisdiction over the "Green System" in the first instance.[11] In addition to the factors mentioned at

[11] In Commission Opinion No. 610 in Docket No. CP71–89 (United Pet. App. 91a), decided after the decision below in this case, the Commission determined that it had jurisdiction over the "Green System." The opinion is currently pending on appeal before the Fifth Circuit *sub nom. Humble Oil & Refining Co.* v. *Federal Power Commission*, No. 72–1720.

pages 35–38 of our main brief, we point out that the merits of the jurisdictional issue were never before the district court, and were improperly ruled upon by the court of appeals. The documentary evidence in the certificate proceeding before the Commission (Docket No. CP71-89) was introduced in the district court for the limited purpose of showing the status, scope, and extent of the Commission proceedings (App. 138, 182). The Commission specifically pointed out that the evidence was not presented to establish the truth of the representations contained therein (App. 182) and LP&L's counsel agreed to the admission of the evidence for that purpose only (App. 239). In view of the fact, however, that LP&L (LP&L Br. 38–46) has argued the merits of certificate jurisdiction in its brief in this Court, maintaining that the "Green System" is purely intrastate and thus beyond the Commission's certificate jurisdiction under Section 7 of the Act, some response is necessary.

United witness J. H. Echterhoff testified in the district court below that a portion of the gas certificated for interstate commerce on United's "Black System" was injected into the "Green System" with the remainder of the stream continuing out of state (App. 179).[12] Echterhoff further testified that, if the interconnections between the Green and Black systems were closed off, the Green System would have an insufficient supply to meet the needs of customers on

[12] Similar testimony was offered by LP&L witness Belvin (App. 225–227).

that system, and that a "critical situation" would develop in the New Orleans area served by the Green System.[13]

The Commission in Opinion No. 610, while finding jurisdiction over the Green System and remanding the issue of certification to the examiner, also took steps to avoid such a critical situation from occurring in the New Orleans area by ordering United, on an interim emergency basis, to continue to deliver interstate gas to New Orleans customers served by the Green System (United Pet. App. 121a). LP&L seeks to terminate all such injections. If such a termination is to occur, however, it should come through a complete review of the record in the direct review proceedings now pending before the Fifth Circuit, wherein all customers dependent upon the Green System can be heard, and not in a collateral proceeding instituted by a single industrial customer.

[13] Upon consideration of the record in the certificate proceeding, the Commission concluded that: "Evidence of record shows that United's customers in this area have in the past received substantial quantities of interstate gas supplies during the 1970–71 heating season and, based on projections for the 1971–72 heating season and thereafter, will require more substantial quantities of interstate gas, approximately 67% of the peak-day requirements in the New Orleans District." (United Pet. App. 102a–121a.)

For the foregoing reasons and for the reasons stated in our main brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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